

1600054 (Migration) [2016] AATA 4757 (5 December 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Vaclav Skala
CASE NUMBER:	1600054
DIBP REFERENCE(S):	BCC2015/3471557
MEMBER:	K. Chapman
DATE:	5 December 2016
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations • cl.820.221(1) of Schedule 2 to the Regulations.

Statement made on 05 December 2016 at 11:43am

CATCHWORDS

Partner (Temporary) (Class UK) visa – Subclass 820 – cl 820.211 – cl 820.221 – Genuine and continuing relationship – Both parties twice previously married – Joint finances – Shared family responsibilities – Combined holidays – Decision under review remitted

LEGISLATION

Migration Act 1958

Migration Regulations 1994

CASES

Jayasinghe v MIMA [2006] FCA 1700

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 21 December 2015 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, Mr Skala, applied for the visa on 20 November 2015 on the basis of his relationship with his sponsor, Ms Rod. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that Mr Skala did not satisfy cl.820.211(2)(a). Whilst satisfied Mr Skala was married to Ms Rod at the time of the visa application, the delegate was not satisfied that they were in a genuine and continuing spousal relationship. On 4 January 2016 Mr Skala applied to the Tribunal for review of the visa refusal decision, providing a copy of that decision to the Tribunal with his application.
4. The applicant appeared before the Tribunal on 17 November 2016 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Czech and English languages.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

ISSUES AND LAW

6. There is a two stage process for Partner visas. An applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis, prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years. The issues in the present case are whether the applicant was at the time of the visa application, and remains at the time of the making of this decision, the spouse of the sponsor.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

7. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor, who is an Australian citizen.
8. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties'

household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

9. BACKGROUND

10. Mr Skala is a 62 year old national of The Czech Republic. He made several trips to Australia on Visitor visas between 2013 and 2015. According to the visa application and material in support, Mr Skala first met the sponsor, Ms Rod, in the Czech Republic in August 2009. They were married in Logan on 19 September 2015. Ms Rod is 59 years old, was born in The Czech Republic and acquired Australian Citizenship on 2 December 1991.

CONSIDERATION OF CLAIMS AND EVIDENCE

ARE THE PARTIES VALIDLY MARRIED?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The review applicant enclosed with his visa application a marriage certificate indicating his marriage with the sponsor took place on 19 September 2015 at their residence in Logan. On the evidence before the Tribunal, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

12. In assessing whether the applicant and sponsor have been in a spousal relationship, the Tribunal has considered the documentary evidence submitted with the primary application, additional documentary evidence that was provided to the Tribunal and the oral evidence given during the review hearing. Having regard to the principles outlined in the decision of *Jayasinghe v MIMA* [2006] FCA 1700, when considering the circumstances of the relationship at the time of the visa application the Tribunal has had regard to later events as they tend logically to show the existence of prior facts. The Tribunal observes this is a matter where the applicant submitted limited documentary evidence in support of his visa application to the Department of Immigration and then furnished the Tribunal with more extensive evidence that was unavailable to the primary decision maker.

13. *Financial aspects of the relationship*

14. The Tribunal had very little documentary evidence before it of the financial aspects of the relationship at the time of application. At the hearing both the applicant and the sponsor gave consistent oral evidence they kept separate accounts at the beginning of their relationship and pooled their resources through withdrawals from their respective accounts. The applicant received, and continues to receive, a pension from a Czech financial institution, whilst the sponsor receives a pension from the Australian government. The couple explained they are of limited means and have no major financial assets together. Indeed, the applicant received a reduction in the Tribunal fee for the review application. The couple established a joint bank account on 29 December 2015 however they conceded it had not received much use with their respective pension incomes still paid to their individual accounts. Both the applicant and the sponsor reside in a house owned by the sponsor's daughter and her partner, with rent shared between them for this accommodation. A Telstra phone account issued in July 2016 in joint names for that residence is suggestive of the couple jointly meeting this expense.
15. The Tribunal accepts the oral evidence of the applicant and sponsor that they pool their pension incomes from individual accounts to purchase the daily necessities of life. The Tribunal had before it recent bank statements from the applicant's Czech account and the

sponsor's Australian account which tended to support this contention. Whilst they are both of limited means, the documentary evidence concerning the financial aspects of their relationship is limited and has led the Tribunal, after careful consideration, to place low weight upon the evidence in support of the financial aspects of the relationship.

16. Nature of the household

17. The Tribunal had very limited documentary evidence before it of the nature of the household at the time of application. A letter dated 12 November 2015 from a dental practice addressed to the applicant and an invoice for dental work dated 14 November 2015 correspond to the address of the sponsor listed in her pension documentation. The Marriage Certificate of the couple also contains their address at Logan. The Telstra phone account of July 2016 and bank statements issued following the time of application are addressed to the same residence. The Tribunal had the benefit of photographs submitted by the applicant showing the couple interacting with the sponsor's daughter and her young family at their residence. Both the applicant and sponsor gave consistent oral evidence they regularly see the sponsor's grandchildren and that the applicant makes wooden furniture for them. They also gave consistent evidence as to the manner in which the household operates, including the division of household duties. According to their evidence, the sponsor attends primarily to housework inside the residence whilst the applicant attends to the garden and performs maintenance tasks. Having observed both the applicant and the sponsor provide their oral evidence, the Tribunal is satisfied that they have lived together since the time of their marriage and have genuinely formed a spousal household. The lack of sophistication of the couple accounts for the limited documentary evidence provided concerning the nature of the household, and does not diminish their consistent oral evidence concerning this aspect of their relationship. Accordingly, the Tribunal places medium weight upon the evidence in support of the nature of the household.

18. Social Aspects of the Relationship

19. The Tribunal had before it Statutory Declarations from Mr Daniel Gleeson and Ms Gabriela Rod attesting to the bona fides of the applicant's and sponsor's relationship at the time of application. Both of these individuals are Australian Citizens and the Tribunal accepts the veracity of their Declarations. The applicant provided a very limited selection of photographs to the Department with his visa application, mostly showing himself and the sponsor alone together. However, by the time of the hearing the applicant had furnished the Tribunal with a more extensive suite of photographs showing himself and the sponsor in the company of others. It was apparent to the Tribunal that many of these photographs related to the time of application and were supportive of their contention they were in a genuine relationship at that time. At the hearing the Tribunal asked the applicant and the sponsor to identify the guests depicted in the photographs of their wedding and both provided consistent answers demonstrating the capacity in which they were known to these guests.
20. The couple both provided oral evidence to the Tribunal detailing their holidays together in The Czech Republic and in Fiji. These holidays spanned the period 2009 until 2015. They made trips together to Fiji in November 2013 and November 2014 which are corroborated by travel agency documentation, photographs and Movement Records held by the Department. The applicant submitted several newsletters from a local Czech Association which contain photographs depicting him and the sponsor in various social settings including New Year's Eve, picnics and barbeques. Further photographs before the Tribunal depicted the couple in group social situations with members of the Czech Association. The Tribunal considers the newsletters in conjunction with the additional photography of the applicant to corroborate the couple's evidence concerning the extensive social network they have developed through the Czech Association. After careful consideration, the Tribunal places high weight upon the evidence in support of the social aspects of the relationship.

21. *Nature of the persons' commitment to each other*

22. Having regard to the documentary and oral evidence provided by the applicant and sponsor, the Tribunal is satisfied they first met in The Czech Republic in 2009 and spent significant periods of time together in both that country and in Australia before marrying in September 2015. The Tribunal notes both the applicant and sponsor have been previously married twice each, however these marriages concluded some years before their own marriage. It is apparent the couple has lived together in Australia since August 2014 (excepting their holiday to Fiji together in November 2014) and they have also spent a significant period cohabitating from August 2013 until January 2014. The Tribunal is satisfied that the couple commenced dating in 2009 and the relationship evolved since that time. The applicant and the sponsor both gave oral evidence they draw companionship and emotional support from each other and that they view their relationship as a long term one. The Tribunal accepts this evidence. After careful consideration, the Tribunal affords medium weight to the evidence in support of the nature of the persons' commitment to each other.

23. **CONCLUSION**

24. Having regard to the matters above, the Tribunal is satisfied that Mr Skala and Ms Rod are validly married, have had, and continue to have, a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship between them has been and remains genuine and continuing. The Tribunal is also satisfied that they have lived together since their marriage. The Tribunal is therefore satisfied that the requirements of s.5F(2)(a)-(d) of the Act were met at the time of the visa application and continue to be met at the time of this decision.
25. Given these findings the Tribunal is satisfied that at the time the visa application was made, and at the time of this decision, Mr Skala and Ms Rod were in a spousal relationship as defined in the Act. The Tribunal is also satisfied that Ms Rod was aged over 18 years when she sponsored Mr Skala, and further that she is not prohibited from being a sponsoring partner. Therefore the Tribunal finds that Mr Skala meets the requirements of clauses 820.211(2) and 820.221(1).
26. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

27. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221(1) of Schedule 2 to the Regulations.

K. Chapman
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).